Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-1071

In The

**Supreme Court of the United States**

October Term, 1997

---

CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN,
Attorney General of the State of California,

Petitioners,

v.

ROBERT S. TURNER,

Respondent.

---

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

RICHARD D. CLEARY
*Counsel of Record*
601 West Fifth Street, 8th Floor
Los Angeles, California 90071
(213) 627-0464

Counsel for Respondent
Robert S. Turner

No. 97-1071

In The

**Supreme Court of the United States**

October Term, 1997

CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN,
Attorney General of the State of California,

Petitioners,

v.

ROBERT S. TURNER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**Motion of Respondent Robert S. Turner to Proceed in Forma Pauperis**

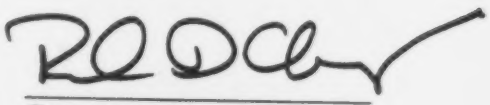
Respondent, Robert S. Turner, respectfully moves for leave to file the attached Brief in Opposition to Petition for Writ of Certiorari and to proceed in this case *in forma pauperis*. Respondent has previously been granted leave by the United States District Court and the United States Court of Appeals for the Ninth Circuit to proceed in forma pauperis. On October 12, 1995 the United States District Court for the Central District of California appointed Richard D. Cleary to represent Respondent pursuant to 18 U.S.C. § 3006A. That representation has continued through the filing

of this motion and the accompanying Brief in Opposition to Petition for Writ of Certiorari.

Respectfully submitted,

Dated: January 28, 1998

RICHARD D. CLEARY



Counsel for Respondent
Robert S. Turner

## QUESTION PRESENTED

Whether the Court of Appeals erred when it held (i) that the evidence presented at the hearing in the District Court established racial discrimination in violation of *Batson v. Kentucky* at Respondent's 1990 California state court trial, and (ii) that the District Court's decision to the contrary was clearly erroneous.

## TABLE OF CONTENTS

Question Presented ..... i

Table of Contents ..... ii

Table of Authorities ..... iii

STATEMENT OF THE CASE ..... 1

A. State Court Proceedings ..... 1

B. Initial Proceedings in the District Court ..... 1

C. Respondent's First Federal Appeal ..... 1

D. Proceedings on Remand in the District Court ..... 3

E. Respondent's Second Federal Appeal ..... 4

REASONS FOR DENYING THE PETITION ..... 6

I. Review is Not Appropriate to Determine Whether the Court of Appeals Erroneously Evaluated the Evidence or Misapplied *Batson v. Kentucky* ..... 6

II. The Court of Appeals' Decision Will Not Have Any Impact On State Court Decision-Making in *Batson* Cases ..... 8

III. The Petition Presents No Substantial Question Under *Teague v. Lane* ..... 10

IV. There is No Conflict Among the Circuits or Between the State and Federal Courts That Merits Review ..... 11

A. There is No Conflict Among the Circuits ..... 11

B. There is No Conflict between the Ninth Circuit and the California Supreme Court on an Important Question of Federal Law ..... 12

Conclusion ..... 14

## TABLE OF AUTHORITIES

**Cases:**

*Batson v. Kentucky*, 476 U.S. 79 (1986) ..... *passim*

*Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995) ..... 9

*People v. Johnson*, 47 Cal. 3d 1194, 255 Cal. Rptr. 569, 767 P.2d 1047 (1989), *cert. denied*, 494 U.S. 1038 (1995) ..... 13

*People v. Montiel*, 5 Cal. 4th 877, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993), *cert. denied*, 512 U.S. 1253 (1994) ..... 13

*Reynolds v. Benefield*, 931 F.2d 506, 912 (8th Cir.), *cert. denied*, 501 U.S. 1204 (1991) ..... 12

*Teague v. Lane*, 489 US. 288 (1989) ..... 10, 11

*Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995) ..... *passim*

*United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994) ..... 11, 12

**Rules of Court:**

Supreme Court of the United States, Rule 10 ..... 6

## STATEMENT OF THE CASE

### A. State Court Proceedings

Respondent Robert Turner was convicted in 1990 in the Superior Court for the State of California, County of Los Angeles, of murder, robbery and burglary.

During jury selection, the prosecutor used five of nine peremptory challenges to exclude African-Americans. When the jury was seated, all of the African-American men in the jury pool had been challenged or excused. Turner's counsel made a timely objection at trial that the prosecutor had used her peremptory challenges to exclude African-American jurors because of their race. The state trial judge concluded that Turner had not established a "pattern of individual discrimination" and declined to require the prosecutor to explain her reasons for excluding the five African-American jurors.

The Superior Court sentenced Turner to life imprisonment, without the possibility of parole. The California Court of Appeal affirmed Turner's conviction and the California Supreme Court denied Turner's petition for review.

### B. Initial Proceedings in the District Court

Turner filed a pro se habeas corpus petition in the District Court in July 1992. The District Court dismissed the petition and entered judgment against Respondent.

### C. Respondent's First Federal Appeal

In a published opinion, the Ninth Circuit Court of Appeals reversed the District Court's dismissal of Turner's petition on two grounds. First, the Court of Appeals held that Turner had established a prima facie case of racial discrimination by the prosecutor

in the exercise of her peremptory challenges and that the state trial court erred when it failed to require the prosecutor to explain her challenges. The Court of Appeals also held that "constitutional trial error" had occurred when the state trial court permitted the court reporter to read testimony to the jury outside the presence of Mr. Turner and his counsel. *Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995).

The Court of Appeals held that the circumstances surrounding the prosecutor's exercise of her peremptory challenges, when taken as a whole, raised an inference of discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court first considered the fact that "the prosecutor had used peremptory challenges to exclude five African-Americans out of a possible nine African-American venirepersons." 63 F.3d at 812. While recognizing that the prosecutor had accepted some African-American jurors, and acknowledging that this weighed against Turner's claim of discrimination, the Court held that this was not dispositive. Instead, the Court concluded that "the prosecutor's exclusion of five out of nine available African-American venirepersons removed a sufficient percentage of African-Americans to establish a pattern of discrimination." *Turner v. Marshall*, 63 F.3d at 813.

The Court found further evidence of discrimination in the fact that although "approximately 30 percent (11 out of 37) of the venirepersons who appeared before the court for voir dire were African-American," the prosecutor used 56% of her peremptory challenges to remove African-Americans. *Id.* "Thus, two different statistics -- the percentage of available African-Americans challenged, and the percentage of peremptory challenges used against African-Americans -- provide support for an inference of discrimination." *Id.*

The Court of Appeals also found that the record showed that the "state trial judge may have impermissibly relied on the fact that African-Americans and other minorities remained on the jury, without considering other factors." 63 F.3d at 814. The Court emphasized that the "exclusion of a single minority juror on account of race would constitute a *Batson* violation," and that a trial court may not deny a *Batson* motion based solely on the fact that some African-Americans remain on the jury.

Considering the facts and circumstances as a whole, the Court concluded that "Turner established a prima facie case of a *Batson* violation, such that the state trial court erred in failing to inquire into the prosecutor's reasons for the peremptory challenges." *Id.* The Court of Appeals therefore remanded the case to the District Court with instructions "to conduct an evidentiary hearing at which it must elicit the prosecutor's motives at the time of the voir dire in order to determine whether there was a *Batson* violation." *Id.*

Petitioners did not seek review of the Ninth Circuit's judgment in this Court.

**D. Proceedings on Remand in the District Court**

The District Court (by a Magistrate Judge) conducted an evidentiary hearing on April 25, 1996. There were four witnesses at the hearing: the Deputy District Attorney who was the prosecutor at Respondent's 1990 trial; the court reporter at Respondent's trial; one of the jurors at Respondent's trial; and Respondent. Following the evidentiary hearing, the Magistrate Judge issued a Report recommending that the petition be dismissed and the District Court entered judgment dismissing the petition.

**E. Respondent's Second Federal Appeal**

The Ninth Circuit, in the judgment from which Petitioners seek review, reversed the District Court. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997). Applying the clearly erroneous standard, the Court of Appeals found that the District Court had erred when it accepted the prosecutor's explanation for her peremptory challenge to juror Romeo McCain, an African-American man. In particular, the Court of Appeals found that the explanation given by the prosecutor – that she dismissed McCain because he was hesitant to look at gruesome crime photographs – was a pretext for racial discrimination. The Court of Appeals based its determination that the explanation for the challenge to McCain was a pretext upon a comparison of the prosecutor's explanation for her challenge to McCain and the prosecutor's acceptance of a white woman – Rosemary Battaglia – who had "expressed even greater reluctance to view the photographs" than McCain. 121 F.3d at 1251-1254.

In finding that the record clearly established that the explanation for the challenge to McCain was racially discriminatory, the Court of Appeals considered various factors, including the following:

- The prosecutor unequivocally testified that the only explanation she could offer for her challenge to McCain was his reluctance to look at crime photographs. This case, therefore, was not one in which a "prosecutor offered several explanations for a peremptory strike, and a seated juror shares *some* of the same characteristics cited as justifications." 121 F.3d at 1253 (emphasis in original).

- Petitioners' argument that the prosecutor dismissed McCain because his hesitance to look at crime photographs was incongruous with McCain's military service in Vietnam -- which the Magistrate Judge adopted in his findings of fact -- was unsupported by the prosecutor's testimony at the evidentiary hearing.
- There was no contemporaneous inquiry by the state court into the prosecutor's reasons for challenging McCain or the four other African-Americans that she dismissed by peremptory challenge. The inquiry mandated by *Batson v. Kentucky* did not take place until 1996 (in the District Court), six years after Respondent's state court trial. That hearing was presided over by a Magistrate Judge who had not observed jury selection or any other part of Respondent's trial. Thus, although the Magistrate Judge "observed the demeanor of the prosecutor firsthand, he did so six years after jury selection took place in state court." 121 F.3d at 1254 n.2.

The Court of Appeals "conclude[d] that a comparative analysis reveals racial reasons for the prosecutor's dismissal of McCain, and that the district court's finding to the contrary is clearly erroneous." 121 F.3d at 1255.

## REASONS FOR DENYING THE PETITION

### I

### Review is Not Appropriate to Determine Whether the Court of Appeals Erroneously Evaluated the Evidence or Misapplied *Batson v. Kentucky*

This Court's Rule 10 provides that review "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Analysis of the Court of Appeals' decision shows that asserted error necessarily falls into one of these two categories.

Petitioners do not seek review of the Court of Appeals' holdings on Respondent's first federal appeal that (i) Respondent established a prima facie case of racial discrimination at his trial, (ii) the state trial court erred when it failed to require the prosecutor to explain the reasons for her peremptory challenges to five African-American jurors, and (iii) Respondent was entitled to an evidentiary hearing in the District Court under *Batson v. Kentucky*.

Petitioners seek review only of the Court of Appeals' decision reversing the District Court's judgment following the evidentiary hearing on remand. The essence of that decision is the Court of Appeals' determination that the evidence Respondent presented in the *District Court* was sufficient to establish racial discrimination by the prosecutor at Respondent's state court trial in violation of his rights under the Fourteenth Amendment.

The Court of Appeals' decision does not raise any issue with respect to review of *state court* fact finding. The Court of Appeals determined in Respondent's first federal appeal that the state court trial court committed legal error when it failed to require the prosecutor to explain the reasons for her peremptory challenges and, therefore, there were no state court fact findings entitled to a presumption of correctness. *Turner v. Marshall*, 63 F.3d at 814 n.4. On remand following that decision, the District Court made findings – for the first time – regarding the prosecutor's motives when she used peremptory challenges to remove five African-Americans from the jury.

Whether the District Court or the Court of Appeals was correct in its weighing of the evidence regarding the prosecutor's motives, there is no question that Respondent was entitled to relief if the prosecutor challenged juror McCain because of his race. This Court held in 1986, in *Batson v. Kentucky*, that a prosecutor violates a defendant's rights under the equal protection clause of the Fourteenth Amendment if she uses a peremptory challenge to remove a juror for racially-motivated reasons. 476 US. at 93-98. Respondent was tried in the California court system in 1990, well after the decision in *Batson*. Accordingly, there is no issue regarding retroactive application of *Batson* to the claims made by Respondent in his habeas corpus petition.

At heart, Petitioners' grievance is their dissatisfaction with the Court of Appeals' determination that the prosecutor at Respondent's trial challenged juror McCain because of his race. If this Court were to grant review and hear this grievance, it would be required to reweigh the evidence already considered by the

Court of Appeals to determine whether the District Court or the Court of Appeals reached the right result. As recognized in Rule 10, such issues are not appropriate for review by this Court under its certiorari jurisdiction.

## II

## The Court of Appeals' Decision Will Not Have Any Impact On State Court Decision-Making in *Batson* Cases

Petitioners misread the decision of the Court of Appeals when they suggest (Petition at 10) that it "impose[s] on California" the requirement that it use "comparative analysis" when reviewing trial court rulings on *Batson* motions. Nothing in the Court of Appeals' opinion compels California appellate courts, or courts in any other state, to engage in comparative analysis when reviewing rulings on *Batson* rulings. Indeed, the Court of Appeals' decision does not even mandate that federal courts in the Ninth Circuit engage in "comparative analysis" whenever they review state court fact finding in *Batson* rulings.

The crucial fact that Petitioners overlook is that the Ninth Circuit's decision involves review of *federal court* fact finding, albeit in the exercise of its habeas corpus jurisdiction. In doing so, the Court of Appeals observed that "comparative analysis is a well-established *tool* for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." 121 F.3d at 1251-1252 (emphasis added). The Court of Appeals did not hold that comparative analysis is constitutionally mandated.

More importantly, the Court of Appeals did not suggest, much less hold, that the California courts erred by not comparing the jurors struck (and the prosecutor's

explanations for striking those jurors) with the characteristics of the jurors that the prosecutor accepted for the panel. Indeed, the Court of Appeals had no opportunity to make such a criticism of the California courts because the California courts never required the prosecutor to explain why she challenged the African-American jurors. The prosecutor first gave those explanations when she testified in federal court in 1996, six years after Respondent's state court trial. The Ninth Circuit's use of comparative analysis was nothing more, as it acknowledged, than a tool in reviewing the district court's findings of fact under the clearly erroneous standard.

The Court of Appeals, moreover, was fully mindful of its obligation to give deference to state trial court findings on the issue of discriminatory intent. The Court carefully distinguished its earlier decision in *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995), where the Ninth Circuit held that it will continue to give great deference to state trial court findings of fact in *Batson* cases, even where the California appellate courts decline to engage in a comparative analysis. As the Court of Appeals explained, "the holding in *Burks* rested in part on the state trial court's contemporaneous inquiry into the prosecutor's reasons." 121 F.3d at 1254. By contrast, in this case

> "no factfinder has had the benefit of contemporaneous explanations from the prosecutor. Although the magistrate judge observed the demeanor of the prosecutor firsthand, he did so six years after jury selection in state court. Moreover, there is no state court finding to presume correct on review. The state trial court determined only that Turner had not established a prima facie case discrimination, and this court has already reversed that finding."

121 F.3d at 1254 & n.2 (citations omitted).

This case poses no threat to the legitimacy of the fact-finding procedures used by the California Courts in reviewing claims under *Batson*.

## III

## The Petition Presents No Substantial Question Under *Teague v. Lane*

Petitioners devote great effort to criticizing the Ninth Circuit Court of Appeals and its supposed reluctance to apply the rule of *Teague v. Lane*, 489 U.S. 288 (1989). Petitioners' attacks on the Ninth Circuit notwithstanding, this case presents no genuine issue under *Teague*.

The defect in Petitioners' argument is that the Court of Appeals did not announce any new constitutional rule. *Teague* holds that "new *constitutional rules* of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310 (emphasis added). As shown above, the Ninth Circuit did not decide that the California Courts committed constitutional error by not using "comparative analysis" to review Respondent's claim under *Batson*. Nor did the Ninth Circuit hold that use of comparative analysis is required by the constitution. The Ninth Circuit simply held that use of comparative analysis was a useful tool in reviewing the District Court's findings of fact -- under the clearly erroneous standard -- following an evidentiary hearing *in the District Court*.

The constitutional rule that the Court of Appeals did apply -- the prohibition against racially-motivated peremptory challenges established in *Batson v. Kentucky* -- was the law before Respondent was brought to trial. The Ninth Circuit did not

announce or apply a "new rule," and this case presents no genuine issue under *Teague v. Lane*.

## IV

## There is No Conflict Among the Circuits or Between the State and Federal Courts That Merits Review

Petitioners argue that the decision of the Ninth Circuit is in conflict with the California Supreme Court and the Fourth Circuit, which, according to Petitioners, "have held that, for purposes of *Batson*, an appellate court should not compare the responses of accepted jurors with those of stricken jurors." Petition at 4. As will be seen, the decision of the Fourth Circuit to which Petitioners refer is not in conflict with the decision of the Court of Appeals in this case. And any divergence between the California Supreme Court's decisions and the decision of the Court of Appeals in this case is not a conflict on "an important federal question" that merits review under this Court's certiorari jurisdiction.

### A. There is No Conflict Among the Circuits

Petitioners' argument that there is a conflict among the circuits relies solely on a purported disagreement regarding "comparative analysis" between the Ninth Circuit, in its decision below, and the Fourth Circuit in *United States v. McMillon*, 14 F.3d 948, 953-954 n. 5 (4th Cir. 1994). *See* Petition at 7. The problem with Petitioners' argument is that it misstates the holding in *McMillon*.

The appellant in *McMillon* argued that discriminatory intent can be established by comparing the characteristics of a white juror accepted by the prosecutor and an African-American juror challenged by the prosecutor. In doing so, she relied on the

Eighth Circuit's decision in *Reynolds v. Benefield*, 931 F.2d 506, 512 (8th Cir.), *cert. denied*, 501 U.S. 1204 (1991), that "the government may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged." While the Fourth Circuit stated in *McMillon* that *Benefield* is "not the law of this Circuit," it expressly declined to decide whether to follow *Benefield*:

> "[W]hile defense counsel argues in his briefs on appeal that one of the seated members of the jury met the characteristics of the struck juror, there was no evidence introduced into the record on this point. Given these circumstances, it would be improper to address the rule of *Benefield* on its merits."

14 F.3d at 953 n.5. Accordingly, because the Fourth Circuit never addressed the merits of comparative analysis, its decision in *McMillon* is not in conflict with the Ninth Circuit's decision in this case.

**B. There is No Conflict between the Ninth Circuit and the California Supreme Court on an Important Question of Federal Law**

Petitioners are correct that the California Supreme Court has declined to use comparative analysis in reviewing decisions denying relief under *Batson,* provided that the trial court has made "a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered . . . ." *People v. Montiel*, 5 Cal. 4th 877, 909, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993), *cert. denied*, 512 U.S. 1253 (1994); *see People v. Johnson*, 47 Cal. 3d 1194, 1216-1221, 255 Cal. Rptr. 569, 767 P.2d 1047 (1989), *cert. denied*, 494 U.S. 1038 (1990). The fact that the California courts, on the one hand, and the Ninth Circuit and other federal courts on the other, have taken somewhat differing approaches to review of *Batson* claims is insufficient to create a

conflict on an "important *federal* question," the necessary predicate for this Court's exercise of its certiorari jurisdiction.

As the Ninth Circuit recognized, comparative analysis is only a *tool*. It will sometimes be helpful in considering whether there was discrimination; in other cases it will be of no value. It was particularly appropriate in this case because of the failure of the state trial court to require contemporaneous explanations by the prosecutor for her peremptory challenges and the resulting lack of any findings of fact to be given deference on habeas review. Moreover, nothing in the Ninth Circuit's decision even implies that comparative analysis is constitutionally mandated in *Batson* cases.

The Ninth Circuit's approval and use of comparative analysis in this case does not create a conflict with the California Supreme Court on an important matter of federal law. The California courts remain free to adopt or reject evidentiary rules and fact-finding "tools" as they deem appropriate, provided only that those procedures comport with the minimum requirements of due process under the federal constitution. This is consistent with basic principles of federalism, which permit the state courts to develop and use their own rules of criminal procedure and evidence, subject only to the limitations imposed by the constitution of the United States. The federal courts, likewise, are free to different employ fact-finding tools than the state courts in California and elsewhere. These differing approaches, all consistent with the constitution, are nothing more than an example of federalism in action.

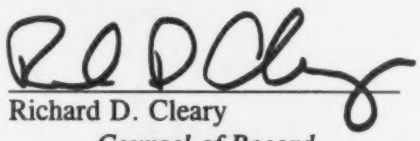
## Conclusion

The only issue presented by this case is whether the record supports the Ninth Circuit's interpretation of the evidence presented in the District Court. If the Ninth Circuit was correct, Respondent was indisputably entitled to relief under the rule of established in *Batson v. Kentucky*.

This Court's function is to decide important issues of federal law, not to reweigh the evidence presented in the lower courts. Respondent, accordingly, requests that the Court deny the Petition for a Writ of Certiorari.

Dated: January 28, 1998

Respectfully submitted,



Richard D. Cleary
*Counsel of Record*
601 West Fifth Street, 8th Floor
Los Angeles, California 90071
(213) 627-0464

*Counsel for Respondent*
*Robert S. Turner*